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Responsibility of international organizations

Comments and observations received from international organizations

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I. Introduction

1. At its fifty-fifth session, the International Law Commission asked the Secretariat to circulate, on an annual basis, the portions of its report relevant to the topic "Responsibility of international organizations" to international organizations for their comments.[1] Pursuant to that request, selected international organizations were invited to submit their comments on the relevant portions of the Commission's 2003, 2004, 2005, 2006 and 2007 reports.[2] Most recently, the Commission sought comments on chapter VIII of its 2007 report[3] and on the issues of particular interest to it noted in paragraphs 29 and 30 of that report.[4]

2. As at 18 March 2008, written comments had been received from the following five international organizations (dates of submission in parentheses): European Commission (18 February 2008); International Maritime Organization (14 December 2007); Organization for the Prohibition of Chemical Weapons (11 January 2008); World Health Organization (WHO) (28 March 2008); and World Trade Organization (18 February 2008). Those comments are reproduced in section II below, in a topic-by-topic manner. Additional submissions received will be reproduced as addenda to the present report.

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[1] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 52.

[2] The written comments of international organizations received prior to 1 May 2007 are contained in documents A/CN.4/545, A/CN.4/556, A/CN.4/568 and Add.1, and A/CN.4/582.

[3] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10).

[4] Paragraphs 29 and 30 of the 2007 report read as follows:

> 29. The Commission would welcome comments and observations from Governments and international organizations on draft articles 31 to 45, in particular on draft article 43, relating to an obligation of members of a responsible international organization to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligation to make reparation.
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> 30. The Commission would also welcome views from Governments and international organizations on the two following questions, due to be examined in the next report:
>
> (a) Article 48 on responsibility of States for internationally wrongful acts provides that, in case of a breach by a State of an obligation owed to the international community as whole, States are entitled to claim from the responsible State cessation of the internationally wrongful act and performance of the obligation of reparation in the interest of the injured State or of the beneficiaries of the obligation breached. Should a breach of an obligation owed to the international community as a whole be committed by an international organization, would the other organizations or some of them be entitled to make a similar claim?
>
> (b) If an injured international organization intends to resort to countermeasures, would it encounter further restrictions than those that are listed in articles 49 to 53 of the articles on responsibility of States for internationally wrongful acts?

II. Comments and observations received from international organizations

A. General remarks

European Commission

As in previous years, the European Commission expresses some concerns as to the feasibility of subsuming all international organizations under the terms of this one draft in the light of the highly diverse nature of international organizations, of which the European Community is itself an example.

International Maritime Organization

As a general matter, it is unclear how the draft provisions would apply to the activities undertaken by this Organization (treaty making and technical cooperation). In the absence of scenarios which would indicate the application of the provisions, it is difficult to offer more specific comments on the implications for us as an international organization.

B. Content of the responsibility of an international organization — General principles

European Commission

The European Commission fully endorses the general principles on the content of international responsibility. Just as States, international organizations are under an obligation to cease the wrongful act and offer appropriate assurances of non-repetition, and to make full reparation for the injury caused by the internationally wrongful act. In particular, the dispute settlement practice of the European Community evidences the acknowledgment of international responsibility for breaches of its contractual obligations.

For example, the Community responds in a routine manner to decisions of the World Trade Organization Dispute Settlement Body to bring Community measures into conformity with its obligations arising from the covered agreements in compliance with the rules enshrined in the Dispute Settlement Understanding. As a corollary, the European Community asks its World Trade Organization partners to cease applying retaliatory measures against it, once the internal legislation is brought in line with World Trade Organization requirements. Upon application from the European Community, a World Trade Organization Panel has recently issued two reports clarifying the relevant rules binding on all World Trade Organization members in that respect in the *Continued Suspension* cases.[5]

Moreover, the Community's consent to article 6 of Annex IX to the United Nations Convention on the Law of the Sea on "Responsibility and liability" shows the acceptance of the principle of full reparation. However, to date no case law on the interpretation of this provision can be reported. An application of Chile against

[5] Panel Reports of 21 December 2007, *United States — Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS 320R; *Canada — Continued Suspension of Obligations in the EC-Hormones Dispute*, WT/DS 321R.

the European Community in the *Swordfish* case is currently suspended until 31 December 2008.

Organization for the Prohibition of Chemical Weapons

Articles 31 to 45 of the draft articles on responsibility of international organizations refer to the legal consequences arising from the commission of an internationally wrongful act by an international organization.

The text of the draft articles allows for the proposition that the international organization committing an internationally wrongful act would have three primary obligations: first, the duty to perform the obligation breached is not affected; secondly, the international organization must cease the commission of the wrongful act; and thirdly, it must take assurances and guarantees that there will be no repetition of such act.

With respect to draft articles 33 (b)[6] and 40,[7] in order to provide appropriate assurances and guarantees of non-repetition, the organization could be required to provide convincing evidence, as appropriate, of its commitment to ensure that the internationally wrongful act will not occur again. Reference may be made here to the *LaGrand* case,[8] in which the International Court of Justice stated, in the context of a State's non-compliance with its consular obligations, that "an apology is not sufficient".[9] The Court considered that "If a State, in proceedings before this Court, repeatedly refers to substantial activities which it is carrying out in order to achieve compliance with certain obligations under a treaty, then this expresses a commitment to follow through with the efforts in this regard".[10] This consideration should be relevant in the present context for assurances and guarantees of non-repetition by both international organizations and States.

World Health Organization

With regard to draft article 35, paragraph 2, it is noted that the rules of the organization could affect the content of the responsibility of an international organization vis-à-vis its member States and organizations. The World Health Organization agrees with that statement; however, besides the operation of the rules of the organization, we believe that there is a more general principle precluding by way of estoppel members of an organization who have voted in favour of a decision authorizing or requesting the organization to carry out certain activities from claiming that actions performed by the organization in response to that request constitute a breach of the organization's international obligations.

In the commentary to draft article 36, it is stated that an example of responsibility of an international organization towards entities other than States and other organizations is that of breaches of "rules of international law concerning employment".[11] We find that statement rather undefined and overbroad. As already

[6] [See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 343.]

[7] [Ibid.]

[8] *LaGrand (Germany v. United States of America), Judgment of 27 June 2001, I.C.J. Reports 2001*, pp. 512-514, paras. 123-125.

[9] Ibid., p. 512, para. 123.

[10] Ibid., pp. 512-513, para. 124.

[11] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 343, p. 207.

noted by the World Health Organization in a previous contribution as well as by other organizations, we cannot share the view that the rules governing employment of the officials of an organization are rules of international law. That statement is not supported by practice and is not consistent with the internal nature of those rules within the legal order of the organization as such.

C. Reparation for injury — General considerations

European Commission

When discussing draft article 34 on reparation, the Special Rapporteur points out that the fundamental principle of full reparation, as spelled out by the Permanent Court of International Justice in the *Factory at Chorzów* case,[12] should apply equally to international organizations. He argues that it would be absurd to exempt international organizations from facing reparation as the consequence of their internationally wrongful acts, as this would be tantamount to saying that international organizations would be entitled to ignore their obligations under international law (see A/CN.4/583, para. 22).

While the result is certainly obvious, one may wonder about the exact underlying reasoning. It seems that the duty of reparation also arises for an international organization for breaches of their obligations because of the fact that they were allowed to participate in the conduct of international relations as a subject of international law in the first place. In other words, the duty to make reparation for wrongful acts corresponds to the capacity to act under international law — no power, without responsibility. Viewed from this angle, it would indeed be absurd if one category of actors (States) would face more severe legal consequences for internationally wrongful acts than another category of actors (international organizations). Accordingly, the justification for the duty of reparation rests within the nature and function of international law as legal system designed to regulate the conduct of its subjects in a non-discriminatory way.

Organization for the Prohibition of Chemical Weapons

Articles 34 to 40 deal with the reparation of the injury. As provided in the articles on responsibility of States for internationally wrongful acts (see General Assembly resolution 56/83, annex), the draft articles on responsibility of international organizations also establish three forms of reparation for an internationally wrongful act: restitution, compensation and satisfaction.

The text of the draft articles allows for the proposition that the primary responsibility of the international organization committing the breach in question is to re-establish the situation as it was before the breach. However, when restitution is materially impossible or out of proportion the organization must provide compensation, whether moral or material. Draft article 40 (1) states that the international organization responsible for an internationally wrongful act is under the obligation to give satisfaction for the injury caused by that act "insofar as it cannot be made good by restitution or compensation".[13] It would appear that there is

[12] *Merits, P.C.I.J., Series A, 1928, No. 17*, p. 47.

[13] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 343.

an order of priority between the three forms of reparation provided for in the draft articles — restitution, compensation and satisfaction. Accordingly, when restitution is not possible, the organization in breach shall compensate, and if neither restitution nor compensation is possible then satisfaction will be the legal consequence for the breach.

World Health Organization

In the commentary to draft article 34, it is stated that international organizations sometimes grant compensation ex gratia due to a reluctance to admit their own international responsibility as a basis for reparations.[14] While that statement may be correct in general, it should be noted that WHO has granted compensation on an ex gratia basis when there is no legal basis to pay compensation under the applicable rules of the Organization but it is felt that compensation is appropriate for humanitarian or equitable reasons. Such payments are thus not forms of settlement to avoid acknowledging responsibility, but on the contrary voluntary payments unrelated to the responsibility of the Organization. Examples that have occurred in this connection are payments for injuries or death of volunteers who participate in poliomyelitis vaccination campaigns coordinated by WHO. In such cases, there was no contractual obligation on WHO to compensate those injuries and payments were made on humanitarian grounds.

D. Draft article 43 — Ensuring the effective performance of the obligation of reparation

3. Draft article 43, as provisionally adopted by the Commission at its fifty-ninth session, reads as follows:

Article 43

Ensuring the effective performance of the obligation of reparation

The members of a responsible international organization are required to take, in accordance with the rules of the organization, all appropriate measures in order to provide the organization with the means for effectively fulfilling its obligations under this chapter.[15]

European Commission

While the principle is acceptable and the language appears satisfactory, the question arises whether the new draft article is well placed. Currently, as draft article 43, it is put at the end of chapter II on reparation for injury. That chapter mainly discusses the different forms of reparation, interest and mitigating circumstances. However, the additional duty of member States can also be seen as a general principle falling under chapter I. If that view was taken, a more appropriate place would be to insert the language of draft article 43 as a new paragraph 3 of draft article 34. As a consequence thereof, a slight modification in the wording

[14] Ibid., p. 204.

[15] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 343.

would be warranted: the reference to "this chapter" in draft article 43 would have to be deleted, if the provision were to be moved to chapter I.

International Maritime Organization

The proposed articles would extend the terms of the draft articles on "Responsibility of States for internationally wrongful acts" to the "Responsibility of international organizations". The key provision on which comments are requested (draft article 43) concerns "ensuring the effective performance of the obligation of reparation" [...]. It is our understanding that this article would be effective in a case when the international organization concerned is found to be in breach of an international obligation (i.e. when an act — by an organ or agent of the organization — "is not in conformity with what is required of it by that obligation, regardless of its origin and character"). As threshold issues, we would wish to clarify (a) what process would be used for determining that a breach had occurred; (b) how the amount/form of reparation would be determined; and (c) what relationship this situation would have to the Convention on the Privileges and Immunities of the Specialized Agencies (which is mentioned in commentary under article 39 in the context of activities in the Congo in the 1960s, but not in an explanatory way relating to the proposed articles).

Organization for the Prohibition of Chemical Weapons

Regarding draft article 43, while desirable, it is our view that the inclusion in the draft articles of an obligation of member States to take all appropriate measures to provide the organization with the means for effectively fulfilling its obligations would amount to progressive development of international law. It may then also be useful to consider what such appropriate measures could consist of, especially if there is no reference thereto in the constituent documents of the organization. Such measures could conceivably include giving the organization the right to request contributions from member States when considered necessary, and explicit reference to an obligation on the part of member States to cooperate financially to enable the organization to make adequate reparation for wrongful acts committed by it.

World Health Organization

The World Health Organization supports the inclusion of draft article 43 with the language approved by the Drafting Committee. While members of an international organization do not have in principle a residual responsibility for the acts of that organization, international organizations may in practice find themselves without the necessary financial resources to pay reparation in case of a breach of their international obligations. That situation is largely dependent on the mode of financing of international organizations, through contributions assessed on members as well as through generally earmarked voluntary contributions. Consequently, an article of an expository nature reminding members of their commitment to enable their organization to fulfil its international obligations is certainly useful.

World Trade Organization

Regarding draft article 43, relating to an obligation of members of a responsible international organization to take, in accordance with the rules of that organization, all appropriate measures in order to provide the organization with the

means for effectively fulfilling its obligation to make reparation, we have the following remarks, having regard to the comments enclosed in the Commission's report:

We are inclined to support the text currently in the draft, and not that proposed in footnote 510.[16] This has to do primarily with the "member driven" nature of our organization, pursuant to which our Director-General and the Secretariat have limited power to initiate any action of the World Trade Organization outside the limited implementation powers delegated by its members. In our opinion, an obligation — for instance — to pay financial compensation to a State or another international organization would require the prior consent of our members. An obligation directly binding our members would probably, in the case of a wrongful act committed by the World Trade Organization, better ensure that actions are taken to compensate for the consequences of the wrongful act. While we are mindful of the content of the commentary, particularly items 6 and 7, we are also concerned that the terms "in accordance with the rules of the organization" in draft article 43 could be invoked to limit the obligations of members if the obligation to repair consequences of wrongful acts is not expressly provided in the organization's internal rules.

E. Serious breaches of obligations under peremptory norms of general international law

European Commission

[...] the Special Rapporteur puts forward the view that international organizations should also face the same consequences as States when their internationally wrongful act constitutes a serious breach of obligations under peremptory norms of general international law. Indeed, for the same reasons as those set out above (see section II.B), this parallelism is theoretically sound.

In this regard, the difficult question arises whether the draft articles should specifically emphasize the duty of member States of an international organization to bring the breach of the organization to an end. It would be hard to formulate a rule which equally applies to all members of an international organization, although only those sitting in a particular institution thereof could bring about the appropriate remedy if that institution had adopted the allegedly wrongful act. Thus, the Special Rapporteur has good reasons not to attempt to define a specific duty in the draft articles that members of the responsible organization would have (see A/CN.4/583, para. 58), but to leave this issue to the applicable rules of the organization.

Finally, international organizations are also (like States) under an obligation not to recognize as lawful a situation created by a serious breach (draft article 45, para. 2). In this respect, the Special Rapporteur rightly mentions the declaration of

[16] [See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10). The text of the footnote reads as follows: "The following text was proposed, discussed and supported by some members: 'The responsible international organization shall take all appropriate measures in accordance with its rules in order to ensure that its members provide the organization with the means for effectively fulfilling its obligations under this chapter.'"]

the Community and its member States made in 1991.[17] It should be pointed out that this is a joint statement of the international organization and its members (and not only of the member States as the Special Rapporteur erroneously writes (see A/CN.4/583, para. 64)) with respect to the particular facts at the time. It therefore also forms part of the practice of the European Community as an international organization.

F. Specific issues raised in chapter III.D of the report of the International Law Commission on the work of its fifty-ninth session

1. Invocation of responsibility by an international organization in case of a breach by another organization of an obligation owed to the international community as a whole

European Commission

Should a breach of obligation owed to the international community as a whole be committed by an international organization, other organizations should, in principle, be entitled to claim from the responsible organization cessation of the internationally wrongful act and performance of the obligation of reparation in the interested of the injured or of the beneficiary of the obligation breached.

See also infra, section F.2, regarding countermeasures.

Organization for the Prohibition of Chemical Weapons

Pursuant to article 48 of the articles on responsibility of States for internationally wrongful acts, only the "injured" State can claim the cessation of the internationally wrongful act and assurances and guarantees of non-repetition as well as performance of the obligation to make reparation. States other than the injured State, in contrast, cannot claim reparation in the form of restitution or compensation. In our view, the situation of international organizations is quite different, and their position is more restricted than that of States. In the case of international organizations, the ability to invoke responsibility for violations of obligations owed to the international community as a whole could depend on the scope of the activities of the organization as defined in its constituent document. Accordingly, every "concerned" international organization could be entitled to invoke responsibility and claim the cessation of the wrongful act to the extent that affects its mandate as set out in its constituent instrument. As for claiming reparation, the concerned organization would be able to claim for restitution or compensation only if it can be considered to be "injured".

In addition, the question only refers to the ability of other international organizations to invoke the responsibility of an international organization. However, there does not appear to be any reason why States — as distinct from other international organizations — may not also be able to invoke the responsibility of an international organization.

[17] *International Legal Materials*, vol. 31 (1992), p. 1,486, at p. 1,487.

World Health Organization

It is difficult, first of all, to imagine an international organization breaching an obligation owed to the international community as a whole within the terms of article 48 on responsibility of States. Should that nonetheless occur, whether or not other international organizations could claim cessation of the act, non-repetition and performance of the obligation depends on the applicable rules of the organizations concerned. Unlike States, international organizations are functional entities established by their members to perform certain functions provided in their rules in the common interest. Whether or not they can take certain actions, even in response to breaches of international obligations such as those envisaged in article 48, will depend on the application of those rules, which of course include decisions taken by their competent governing bodies. The World Health Organization notes that other organizations have commented along similar lines with regard to draft article 45.

World Trade Organization

Regarding the question raised in paragraph 30 (a) of the Commission's 2007 report, on whether, if a breach of an obligation owed to the international community as a whole is committed by an international organization (see para. 1 above), the other organizations or some of them would be entitled to claim cessation of the internationally wrongful act and reparation in the interest of the injured State or of the beneficiaries of the obligation breached, we have the following brief comments:

While, legally speaking, there is no specific reason in this context not to apply to international organizations the regime applicable to States, we are concerned with the consequences that an article similar to article 48 on responsibility of States could have on the performance of their tasks by international organizations and on their survival in case of breach of international law in the performance of those tasks. Indeed, there would be a risk of multiple claims for reparations, which could affect the willingness of such international organizations to initiate new actions in legally complex contexts, lest they be exposed to numerous legal claims. Moreover, multiple claims for reparations could divert the resources of international organizations from their original mandates.

We are generally of the view that, since international organizations are usually created to further common objectives, either the circumstances when they will be deemed liable or the conditions under which they may be subject to claims for reparation or countermeasures should be more limited than in the case of breach of international obligations by States. However, given the current degree of generality of the draft articles, this may not be easily done.

2. Resort to countermeasures by an international organization

European Commission

The right to take countermeasures against a breach of an international obligation that is owed to the international community as a whole is closely linked to the idea of decentralized enforcement of international law. As the international community as a whole cannot act on its own lacking centralized institutions, it is for individual members of that community to take action against the offender on behalf and in the interest of the community. It appears to the European Commission that this right pertains in principle to all members of the international community, including international organizations as subjects of international law. However, at the same time international organizations are entrusted by their statutes to carry out

specific functions and to protect certain interests only. Where the breached obligation relates to subject matters that fall outside the organization's powers and functions, there would be no compelling reason why it should be allowed to take decentralized enforcement action. For example, it is hardly conceivable that a technical transport organization should be allowed to sanction a military alliance for a breach of a fundamental guarantee of international humanitarian law that may be owed to the international community as a whole. Therefore, it seems advisable to restrict the right of an international organization to take countermeasures against another international organization to situations where the former has the statutory function to protect the interest underlying the obligation that was breached by the latter.

In conclusion, the European Community considers that

[...] (b) an injured international organization that intends to resort to countermeasures should encounter the further restriction than those listed in articles 49 to 53 of the articles on responsibility of States for internationally wrongful acts, namely that it can only resort to countermeasures where it has the statutory function to protect the interest underlying the obligation owed to the international community as a whole that was breached.

Organization for the Prohibition of Chemical Weapons

No comment at this time.

World Health Organization

International organizations would in principle be subject to the same constraints as States, as illustrated in articles 49 to 53 of the articles on responsibility of States for internationally wrongful acts, in terms of their recourse to countermeasures. Having said that in general, certain provisions seem in practice to be scarcely relevant for international organizations, in particular those of article 50 on obligations that may not be affected by the adoption of countermeasures. International organizations hardly seem in a position to breach those obligations, in view of their particular status, the nature of their mandate, and the oversight mechanisms to which they are subject.

World Trade Organization

Regarding the question raised in paragraph 30 (b) of the Commission's 2007 report, concerning countermeasures (see para. 1 above), we would simply note that, in some instances, the international organization itself will not be in a position to take countermeasures, but simply to allow its members to take such countermeasures. In some instances, such countermeasures may be in breach of the obligations of members under the rules of the international organization and may call for special derogations. Even when allowed under a particular treaty, countermeasures may breach other international obligations, thus potentially generating liabilities for the organization having authorized such countermeasures and the States having implemented them. We are also generally of the view that it is not the role of international organizations to take countermeasures against other international organizations, if this diverts their resources from their original mandates.